STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of R. HENLEY, Minor.

UNPUBLISHED
January 23, 2014

No. 316629
Wayne Circuit Court
Family Division
LC No. 12-507838-NA

Before: SERVITTO, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

Respondent appeals as of right from an order of adjudication in which the trial court exercised jurisdiction over the minor child pursuant to MCL 712A.2(b)(1) (parent neglects or refuses to provide proper support) and (2) (parent's home is an unfit place for child to live because of neglect, cruelty, drunkenness, criminality, or other depravity). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Respondent is the legal father of the minor child, (date of birth November 17, 2007). Respondent was married to the child's biological mother, Jennifer Kind, when the child was born; the two have since divorced. Kind has sole physical custody of the child and the parents share legal custody.

On June 8, 2012, petitioner filed a petition to initiate child protective proceedings. The petition requested termination of respondent's parental rights. The petition was based on allegations of sexual abuse of the child by respondent, including that respondent had urinated on the child and made him perform oral sex. The petition requested that the child stay in the custody of his mother. At the preliminary hearing, respondent waived probable cause. The court ordered the child released to Kind and suspended respondent's parenting time, pending a psychological evaluation.

On June 19, 2012, petitioner filed a petition to initiate child protective proceedings with respect to Kind based on allegations of physical abuse of all three of her children, including the minor child at issue here. The mother waived probable cause. The trial court authorized the petition and placed the children with petitioner.

Prior to the adjudication, petitioner moved to admit statements made by the child to Kind and to Dr. Lisa Markman under the "tender years" exception to the hearsay rule.[1] After hearing the testimony of Kind and Markman, the trial court granted the motion. In determining that it had jurisdiction over the child, the trial court took this testimony into account.

At the jurisdictional bench trial, Dr. Shana Cacioppo, a clinical psychologist, testified as to the results of her psychological evaluation of the child. She testified that the child had been exposed in some way to "inappropriate content" but she did not know if he was sexually abused. She also referred to some statements that suggested the child may have been coached. However, Cacioppo wanted to err on the side of caution and recommended that the child's visits with both parents be supervised.

Kind testified that during her marriage to respondent, he was addicted to heroin and they had some domestic violence issues, but overall it was a good relationship. She further testified that after the divorce in 2010, respondent visited the child "at his convenience."

Respondent denied all allegations of physical and sexual abuse. Respondent also testified to an incident where the child had burned his arm and Kind had not sought treatment for the burn. He also testified that he was assaulted by the father of one of Kind's other children.

One of Kind's other children testified that he had never been sexually abused by respondent, nor had he witnessed the child at issue being sexually abused. He further testified, in response to the question of whether Kind ever asked him to say that respondent had molested him, that Kind has asked him once if he could go into court and help her out by "saying something along that [sic] lines."

At the end of the trial, the court took jurisdiction over the minor children pursuant to MCL 712A.2b(1) and (2) "due to the unfit home environment and the criminality as a result of domestic violence, substance abuse, and severe physical abuse." The court concluded that DHS proved these grounds by a preponderance of the evidence, but held that a statutory ground for termination had not been proven by clear and convincing evidence. Thus, it was unnecessary to conduct a best interests hearing. On April 25, 2013, the court entered an order of adjudication. The order states that the trial court "takes temporary jurisdiction over the children pursuant to MCL 712A.19b(1) and (2) due to unfit home environment and criminality, due to domestic violence, substance abuse; severe physical abuse." It appears that the trial court mistakenly cited MCL 712A.19b(1) and (2) instead of MCL 712A.2(b)(1) and (2).

[1] Under MCR 3.972(C)(2), a statement made by a child under 10 years of age regarding an act of sexual abuse is admissible through the testimony of the person to whom the child made the statement if the court finds in a pretrial hearing that "the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness." On appeal, respondent does not contest the court's decision to admit and consider Kind's and Dr. Markman's testimony under this exception to the hearsay rule.

II. STANDARD OF REVIEW

"We review the trial court's decision to exercise jurisdiction for clear error in light of the court's findings of fact." *In re BZ*, 264 Mich App 286, 295; 690 NW2d 505 (2004). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed." *Id*. at 296.

III. ANALYSIS

There are two phases in child protective proceedings – the trial, or adjudicative phase, and the dispositional phase. *In re Utrera*, 281 Mich App 1, 15; 761 NW2d 253 (2008). During the adjudicative phase, "the trial court determines whether it may exercise jurisdiction over the minor child pursuant to MCL 712A.2(b)." *Id*. at 15-16. In relevant part, MCL 712A.2(b) provides that a court has "[j]urisdiction in proceedings concerning a juvenile under 18 years of age found within the county:

> (1) Whose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship.
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> (2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for the juvenile to live in.

To exercise jurisdiction, the trial court must find that one of the grounds in MCL 712A.2(b) are proven by a preponderance of the evidence. MCR 3.971(C)(1); *In re BZ*, 264 Mich App at 295.

Respondent argues that the trial court clearly erred in the exercising jurisdiction over the child, because the trial court did not believe the allegations of sexual abuse and did not find that respondent was an unfit parent. Respondent further argues that there was no evidence that the child was ever mistreated while in respondent's care. We disagree.

First, respondent's argument lacks merit because the trial court exercised jurisdiction of the minor child based on allegations against *both* respondent and the child's biological mother. A trial court can exercise jurisdiction over a child after finding that one of the grounds in MCL 712A.2(b) applies to *one of the parents*. *In re LE*, 278 Mich App 1, 17-18; 747 NW2d 883 (2008). The court's jurisdiction "is tied to the children," not to the parents. *In re CR*, 250 Mich App 185, 205; 646 NW2d 506 (2002). "The court need not separately ascertain whether it has jurisdiction over each parent." *In re LE*, 278 Mich App at 17. The trial court found that it had jurisdiction over the minor child in part because his mother's home was unfit and there were issues of severe physical abuse and substance abuse. Respondent does not contest the trial court's exercise of jurisdiction on these grounds.

Second, there was sufficient evidence for the trial court to exercise jurisdiction over the minor child based on the allegations against respondent. Respondent appears to confuse the burden of proof required for the trial court to exercise jurisdiction and the burden required for the court to terminate parental rights. While petitioner ultimately must prove one of the statutory grounds for termination listed in MCL 712A.19b(3) by clear and convincing evidence, it need only prove a ground for the exercise of jurisdiction by a preponderance of the evidence. MCR 3.971(C)(1); see also *In re Utrera*, 281 Mich App at 15-16.

The trial court did not err in finding that DHS proved by a preponderance of the evidence that respondent sexually abused the minor child. The court admitted the child's statements to Kind and Dr. Lisa Markman under the "tender years" exception to the hearsay rule, MCR 3.972(C)(2). Respondent does not contest the admission of these statements. Kind testified that the minor child told her that respondent made him "eat his wieney [sic]," which made him throw up. The child also said that respondent "peed" on him. Dr. Markman testified that during her physical examination of the minor child, the minor child grabbed his penis and said, "[Respondent] does this to me." The minor child also stated that his dad made him "puke." In a bench trial, the trial court is the finder of fact that determines the weight and credibility of the evidence presented. *Wright v Wright*, 279 Mich App 291, 299; 761 NW2d 443 (2008). The court evidently believed some of this testimony and this Court "accords deference to the special opportunity of the trial court to judge the credibility of the witnesses." *In re Fried*, 266 Mich App 535, 541; 702 NW2d 192 (2005).

Respondent also argues that the trial court erred by not considering the best interest factors or making a finding regarding the minor child's best interests. However, the trial court need not consider the best interests of the child in a child protective proceeding until petitioner has proved a statutory ground for termination by clear and convincing evidence. See *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012). Once a statutory ground for termination has been proven, DHS must demonstrate by a preponderance of the evidence that termination is in the child's best interests. *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). Respondent does not provide any legal support for his contention that the trial court was required to consider the minor child's best interests at the adjudication or "in order to take any action *other than* releasing [the minor child] to the care and custody of his father." "It is not enough for an appellant to simply announce a position or assert an error in his or her brief and then leave it up to this Court to discover and rationalize the basis for the claims . . . ." *DeGeorge v Warheit*, 276 Mich App 587, 594-595; 741 NW2d 384 (2007).

Finally, respondent argues that the trial court erred in making his visitations with the minor child supervised. Under MCL 712A.19b(4), the trial court "may suspend parenting time for a parent who is a subject of the petition." See also MCR 3.977(D). In this case, the original petition filed by DHS sought termination of respondent's parental rights, so the court had the discretion to suspend respondent's parenting time entirely. Once the trial court takes jurisdiction, it "may order compliance with all or part of the case service plan and *may enter such orders as it considers necessary in the interest of the child*." MCR 3.973(F)(2) (emphasis added). In this case, the trial court reasonably determined that supervised visitation was in the minor child's best interests. The court concluded that a preponderance of the evidence supported the conclusion that respondent sexually abused the minor child. Thus, ordering that respondent's visitations with the minor child be supervised was well within the court's discretion.

Affirmed.

/s/ Deborah A. Servitto
/s/ Christopher M. Murray
/s/ Mark T. Boonstra